K & L Fire Protection Systems, Inc. *and* Sprinkler Fitters Local Union 676. Case 34–CA–5137

March 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On January 14, 1992, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, K & L Fire Protection Systems, Inc., West Haven, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent's exceptions, filed by Lawrence Babbitt Jr., its vice president appearing pro se, relate primarily to the circumstances surrounding the Respondent's failure to retain counsel for this proceeding. The Respondent contends that the judge denied it procedural due process at the hearing by not granting Babbitt's request for a 2-week continuance. We find, based on the following facts, that the judge did not abuse his discretion by finding the request untimely and then going forward with the hearing. On May 2, 1991, the complaint issued and set the hearing date for November 14, 1991. On May 31, 1991, the Respondent filed a Chapter 11 bankruptcy petition. On November 11, 1991, the Respondent applied to the bankruptcy court for authorization to appoint an attorney to represent it in this proceeding. At the hearing Babbitt informed the judge about the application and requested the continuance to await approval by the court. The judge, however, agreed with the counsel for the General Counsel that, because the complaint had been outstanding for more than 6 months, the application, made only 3 days before the hearing and without notice to the counsel for the General Counsel, was an insufficient basis for seeking a delay in the hearing. In connection with our rejection of the Respondent's due-process claim, and noting that the bankruptcy court authorized the employment of an attorney on November 20, 1991, we also deem it significant that Babbitt continued to represent the Respondent, apparently without aid of counsel, by filing the brief to the judge and the exceptions to the judge's decision. In these circumstances, there is no basis for finding prejudicial error in the conduct of the hearing, nor do we find any basis for granting Babbitt's motions to reopen the record or for a hearing de novo.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

William O'Connor, Esq., for the General Counsel.
Lawrence Babbit Jr., for the Respondent.
Robert M. Cherverie, Esq. (Ashcraft & Gerel), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on November 14, 1991,[1] in Hartford, Connecticut. The complaint and notice of hearing, which issued on May 2, and was based on an unfair labor practice charge filed on March 18 by Sprinkler Fitters Local Union 676 (the Union) alleges that K & L Fire Protection Systems, Inc. (Respondent) since about December 1, 1990, has unilaterally failed to continue in full force and effect its contract with the Union by failing to make the contractually required payments to the National Automatic Sprinkler Industry Welfare Fund, National Automatic Sprinkler Industry Pension Fund, Sprinkler Industry Supplemental Pension Fund, National Automatic Sprinkler Education Fund, and the Apprentice Fund of New York. The complaint further alleges that Respondent unilaterally failed to pay the required wages to the following of its employees: Donald Schmaling, Joseph Preston, Andy Katona, Thomas Sullivan, Stanley Sulik, David Bemis, William Robsky, Alan Pierce, William Tomlin, James DeVito, Robert Crain, Jose Collazo, Howard Ceccarini, James Doyle, and George DeVincke. By these actions, Respondent is alleged to have violated Section 8(a)(1) and (5) of the Act.

On the entire record, including the briefs received[2] and my observations of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Connecticut corporation with its office located in West Haven, Connecticut, is engaged as a contractor installing sprinkler fire protection systems. During the 12-month period ending March 31, Respondent purchased and received at its West Haven facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Connecticut. During the same period, Respondent performed services valued in excess of $50,000 in States other than the State of Connecticut. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. FACTS AND ANALYSIS

Many items are not in dispute: on September 10, 1990, Respondent and the Union entered into a short-form agreement for Independent Employers. This obliged Respondent to abide by the terms of the Union's agreement with the Na-

[1] Unless indicated otherwise, all dates are in 1991.

[2] Respondent enclosed a number of ''attachments'' along with its memorandum. Because these attachments were never offered into evidence and are therefore not part of the record, they were returned to Respondent and were not considered.

tional Fire Sprinkler Association, Inc. and the Mechanical Contractors Association of Connecticut, Inc., effective August 1, 1990. This agreement requires that certain wages and expenses be paid to the employees, and that specified payments be made to the funds specified in that agreement. Respondent admits that it has not made certain of the required payments to the employees and funds. Respondent filed for bankruptcy on May 31.

No case citation is needed for the proposition that the unilateral failure to make contractually agreed-on payments violates Section 8(a)(1) and (5) of the Act. As regards Respondent's difficult financial situation, the Board, in *Nick Robilotto, Inc*., 292 NLRB 1279 (1989) stated: ''The Respondent's claim that it is financially unable to make the required payments does not constitute an adequate defense to an allegation that an employer violated Section 8(a)(5) and (1) and Section 8(d) of the Act by failing to abide by a provision of a collective-bargaining agreement.'' It is therefore admitted that Respondent violated the Act; the only issue is the amount that Respondent failed to pay or underpaid, both to the employees and to the funds here. Each employee involved here will be discussed separately below and then the amounts due to the funds will be discussed.

The wage rate for the journeymen under the agreement was $22.80 an hour; an additional $1.50 (or $24.30) was paid to the foremen. The agreement also provides for the payment of travel expenses to the employees, dependent on the distance to the job. There is agreement between the parties over the amount owed to 7 of the 14 employees involved.

Donald Schmaling, a foreman, is owed for 96 hours (March 18–22, March 25–28, April 1, 2, and 8) at $24.30 an hour, plus $160 travel expenses[3] for a total of $2492.80.

Joseph Preston, a journeyman, is owed for 96 hours (March 18–22, March 25–28, April 1, 2, and 8) at $22.80 an hour, plus $60 travel expenses, for a total of $2248.80.

Andy Katona, a journeyman, is owed for 88 hours (March 18–22, March 25–28, April 1, 2, and 8) at $22.80 an hour, plus $154 in travel expenses, for a total of $2160.40.

George DeVincke, a journeyman, is owed for 56 hours (March 4–8, and March 11 and 12) at $22.80 an hour, plus $119 in travel expenses,[4] for a total of $1395.80.

William Robsky, an apprentice, is owed for 80 hours (March 18–22, 25, and 28, and April 1 and 2) at $15.96 an hour, plus $170 in travel expenses, for a total of $1446.80.

William Tomlin, a journeyman, originally, was not paid 40 hours of work between February 15 and March 1, 32 hours between March 4 and 8, and 24 hours between March 18 and 20, plus $204 in travel expenses. Subsequently, Respondent reimbursed Tomlin for all except 16 hours at $22.80 an hour and $34 travel expenses for a total of $398.80.

Jose Collazo is owed the sum of $480.12, although the record does not set forth the period of time that this amount represents.

The parties disagree on the amount owed to the employees who follow.

David Sulik: The parties agree that Sulik was a journeyman earning $22.80 an hour; the General Counsel alleges that he is owed for a total of 120 hours in the following manner: February 1, 8 hours at $22.80 an hour, plus $14 travel expenses; February 2, 8 hours at double time ($45.60 an hour) plus $14 travel expenses; March 2 and 3, 16 hours at double time, plus $14 travel expenses; March 18–22, 40 hours at $22.80 an hour, plus $70 travel expenses; March 25–28, 32 hours at $22.80 an hour, plus $56 travel expenses; and April 1 and 2, 16 hours at $22.80 an hour, plus $28 travel expenses. All this totals $3479.20. Respondent's memorandum admits that Sulik was owed for 96 hours at regular time of $22.80, plus $168 travel expenses. Additionally, Lawrence Babbitt, vice president of Respondent, testified that Sulik (now deceased) was owed for working on February 2 and March 2 and 3, all weekend days and therefore payable under the contractual rate of double time, $45.60 an hour. That would, apparently, account for the discrepancy of 24 hours, and I therefore find, as alleged in the General Counsel's brief, that Sulik is owed $3479.20.

Thomas Sullivan: The parties agree that he is owed for 96 hours. They disagree on the hourly rate; the General Counsel alleges that he was an apprentice paid at $19.38 an hour. Respondent alleges that he should be paid at $17.61 an hour. The agreement provides that apprentices are to be paid an amount equal to 40 to 85 percent of the journeyman rate, dependent on the classification of the apprentice. Babbitt testified that Sullivan's hourly rate was the same as David Bemis, who testified that during the period in question he was paid $19.38 an hour. I therefore find that Sullivan is entitled to 96 hours at $19.38 an hour, plus $154 travel expenses, for a total of $2014.48. This was for 40 hours on March 18–22; 32 hours for March 25–28; and 8 hours each, April 1, 2, and 8.

David Bemis: The General Counsel alleges that Bemis is owed for 96 hours (40 hours March 18–22; 32 hours March 25–28; and 8 hours each, April 1, 2, and 8) at his apprentice rate of $19.38 an hour, plus $168 in travel expenses. Respondent alleges that Bemis is owed for 88 hours at $18.24 an hour. Bemis testified that his regular hourly rate at the time was $19.38 an hour, and I so find. Schmaling testified that Bemis worked in his crew for 24 hours during the week of March 18–22; 32 hours from March 25–28; and 8 hours each on April 1, 2, and 8, plus $14 a day travel expenses for each of those days. In addition, Bemis testified that he worked on March 20 and 21, for 8 hours each day, on a different job. I therefore find that, as alleged by the General Counsel, Bemis is owed for 96 hours at $19.38 an hour, plus $168 travel expenses, for a total of $2028.48.

James DeVito: At the hearing the parties stipulated that Devito as a foreman earned $24.30 an hour and was owed for 40 hours of regular time at this rate, two 8-hour shifts at double time ($48.60), and 7 days of travel at $9 a day, for a total of $1812.60. No period of time is specified for this employment. Respondent, in his memorandum, states that DeVito is owed $1127.67 ''for a check which was returned.'' This is not explained or supported further. I find that, as the parties stipulated at the hearing, DeVito is owed $1812.60 by Respondent.

James Doyle: Doyle was a foreman earning the regular rate of $24.30 an hour. The General Counsel alleges that for the week of July 22–27 he was owed for 40 hours at the regular rate, 8 hours at time and a half ($36.45 an hour), 10 hours at double time ($48.60 an hour), and $54 in travel ex-

[3] Respondent's memorandum states that the travel expenses are $168.

[4] Respondent's memorandum lists the travel expenses as $123.

penses; for the week of July 29 to August 2 he was owed for 40 hours at the regular rate, 4 hours at time and a half, and $45 travel expenses; and for August 12 and 13, he was owed for 16 hours at the regular rate and $18 for travel expenses, a total of $3373.20. Respondent's memorandum states that Doyle is owed $7908; that by agreement of Respondent, Doyle, and ''Roth Brothers,'' Roth Brothers would pay him $3950 of this amount and the Respondent would pay him the balance, $3958. Doyle testified that the days and amounts above alleged by the General Counsel were the days he worked and was never paid for. In cross-examining Doyle, Babbitt did not dispute his testimony, but alleged that a contractor on that job was supposed to pay Doyle's salary, but failed to do so. Without necessarily blaming Respondent for this failure to pay, Doyle was employed by Respondent, who was therefore obligated to pay him pursuant to the contract with the Union. The record supports the General Counsel's claim that he is owed $3373.20 for this period.

Alan Pierce: Pierce was employed by Respondent as a foreman at the $24.30 regular hourly rate. The testimony establishes that Pierce worked and was not paid for the following times: the week of February 11–16, 24 hours at $24.30 an hour, 8 hours at $48.60 an hour, and 4 days' travel expense at $5 a day. For the week of February 25 through March 1, 40 hours at $24.30 an hour and $25 travel expenses. For the week March 4–9, 40 hours at $24.30 an hour, 3-1/2 hours at time and a half ($36.45 an hour), 8 hours at double time ($48.60), and $30 travel expenses, and for March 16, 8 hours at double time ($48.60) and $5 travel expenses. The total owed for these days is $3821.18.

Robert Crain: The General Counsel alleges that Crain, a journeyman, is owed for 8 hours for work on February 2, a Saturday. It would therefore be at doubletime, $45.60 an hour. Crain did not testify, so there is no evidence what his travel expenses are. Respondent defends that he is owed no money and that this claim should be denied because he was paid in full when he left their employ. Respondent's payroll records for the week in question establish that he worked 8 hours on February 2 and that he was paid for 40 hours that week, but was not paid for any double time that week. According to Babbitt: ''It's my feeling, definitely, that he was paid,'' although he has no documents to prove it. Because Saturday work is payable at doubletime ($45.60 an hour), that pay would have to appear separately on Crain's payroll for that week. As it was not, and there is no other proof that he was paid for that day, I find that he is owed for 8 hours at $45.60 an hour, or $364.80.

Howard Ceccarini: Ceccarini was a journeyman who also functioned for Respondent as a foreman. The General Counsel alleges that Respondent owes him for three periods: 40 hours, January 28 through February 1, at $24.30 an hour; 8 hours, on February 2, at double time, $48.60 an hour; and 16 hours, February 9–10, at double time, $48.60 an hour. Additionally, it is alleged that Ceccarini is owed $295.07 for travel expenses. Respondent alleges that this claim should be denied because he was paid in full. Ceccarini's testimony is complicated because it involves a number of bounced checks which were subsequently resubmitted for payment.

However, he testified that he was never paid for Monday through Saturday, January 28 through February 2, at the foreman's rate of $24–30 for the first 5 days, and double time ($48.60) for February 2, and 16 hours the following weekend, February 9–10, at double time, $48.60 an hour. He was paid for the 40 hours he worked Monday through Friday, February 4–8. During subsequent questioning by Babbitt, the General Counsel, and me, he testified that on February 27, Mike Pope, Respondent's superintendent, paid him in cash for his payroll the prior week, the week ending February 22, based on $1390 earnings that week. (Unfortunately, it is not clear whether he received $1390 gross or net, but I assume it is $1390 gross.) He worked 40 hours, Monday through Friday, that week as a journeyman. Ceccarini testified that this $1390 payment was his salary for that week, including travel expenses. Babbitt alleges that this was meant to cover prior periods owed, as well. Simple computations show that for his last week of employment at Respondent (40 hours at the journeyman rate) his gross pay should have been $872 plus travel expenses. That is substantially less than the $1390 he was paid on February 27, a difference of about $400, even after his expenses. In the absence of any better explanation, I find it reasonable to assume that this difference represents the pay for one of Ceccarini's weekend days at double time, either February 2, 9, or 10. As the foreman, double time for 8 hours comes to $388.80 for the day; with travel expenses, this is about the difference of what he was paid for on February 27, and the prior week's workweek, and I so find.

To complicate matters further, after Ceccarini completed his testimony and left the hearing, Respondent introduced into evidence checks that it had located that were payable to Ceccarini. The first is dated January 31, in the amount of $823, and says that it is for the week ending January 26. The next is dated February 7, in the amount of $1254, and states that it is for the week ending February 2. The final check is dated February 14 in the amount of $979. Respondent alleges that these checks establish that Ceccarini was paid in full for this period. I find that the evidence does not support this contention. Ceccarini was a credible witness who testified, repeatedly, about the days for which Respondent had not paid him; the difficulty that this case entails is due entirely to Respondent and the mess it made of its payroll during the period in question. Just as possible as Respondent's contention that these checks prove that he was paid for the period is the possibility that they were meant to cover previous of Respondent's checks that bounced. I therefore find that Ceccarini is owed for 1 weekend day less than he testified and the General Counsel alleges, and is owed for the week of January 28 through February 1, 40 hours at $24.30 an hour, and February 9–10, 16 hours at the $48.60 double time rate, plus 7 days of travel expenses at $23 a day, for a total of $1910.60.

The complaint further alleges, and Respondent admits, that it failed to make the proper contributions to the following union funds: National Automatic Sprinkler Industry Welfare Fund, National Automatic Sprinkler Industry Pension Fund, Sprinkler Industry Supplemental Pension Fund, National Automatic Sprinkler Industry Education Fund, and the Apprentice Fund of New York. The amounts of each of these contributions, based on hours worked of covered employees, is set forth in the agreement. The only change is that in about August 1990 the contribution to the Supplemental Pension Fund was increased to $3 an hour. The issue is how many hours of contributions did Respondent owe to these funds; obviously, in the situation here, this determination is bound to be an approximation. In arriving at this determina-

tion, I begin with a summary produced for the hearing by Respondent showing (or attempting to show) the total number of hours his employees worked, monthly, from December 1990 through May. In addition, Schmaling, who was the foreman for Respondent on the Boereinger project in Danbury, Connecticut, summarized the hours worked by his crew at that project in March and April. The April hours are clearly not included on Respondent's monthly summary of hours, so these hours (152 hours worked by Schmaling, Preston, Katona, Sullivan, Sulik, Bemis, and Robsky) will be added to those set forth in Respondent's summary. Finally, Respondent also produced trust fund reports for June through August for which payments were not made, and admitted that the June report was 18 hours short, 9 hours each for hours worked by, but not reported for, Pierce and DeVincke. To be subtracted from these hours are the hours that Respondent actually paid into the trust fund during these periods. The final item is in regard to Pope, whom Babbitt admits has continued to work approximately 40 hours a week from August to the date of the hearing here, about 400 hours.

Respondent therefore owes contributions to the Union's funds for the following number of hours:

December 1990—2424
January 1991—3072.5
February 1991—3954
March 1991—2607
April 1991—1106
May 1991—711
June 1991—100
July 1991—493
August 1991—268
September through November 1991—400

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All journeymen sprinklerfitters and apprentices employed by the Respondent at its West Haven, Connecticut facility, but excluding all other employees and guards, professional employees and supervisors as defined in the Act.

4. Since on or about December 1, 1990, Respondent has violated Section 8(a)(1) and (5) of the Act by failing to pay the contractually agreed-on wages to its employees and failing to make the contractually required contributions to the following union funds, without the consent of the Union: National Automatic Sprinkler Industry Welfare Fund, National Automatic Sprinkler Industry Pension Fund, Sprinkler Industry Supplemental Pension Fund, National Automatic Sprinkler Education Fund, and the Apprentice Fund of New York.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act, simply to pay to the above-mentioned union funds the following amounts that it has unlawfully failed to pay. From December 1990 through August 1991, the required contributions for the following number of hours, monthly: 2424, 3072.5, 3954, 2607, 1106, 711, 100, 493 and 268, plus contributions for 400 hours of work for Pope for September through November. I shall also recommend that Respondent be ordered to pay the following amounts to the employees named here: Schmaling—$2492.80; Preston—$2248.80; Katona—$2160.40; DeVincke—$1395.80; Robsky—$1446.80; Tomlin—$398.80; Collazo—$480.12; Sulik— S3479.20; Sullivan—$2014.48; Bemis—$2028.48; DeVito—$1812.60; Doyle—$3373.20; Pierce—$3821.18; Crain—$364.80; and Ceccarini—$1910.60.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, K & L Fire Protection Systems, Inc., West Haven, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally discontinuing, or failing to make, the proper payments to its employees and to the Union's funds without prior negotiations with the Union.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay to the above-named employees and to the union funds named above the contractually required wages and contributions for the number of hours as set forth above in the remedy section.

(b) Post at its facility in West Haven, Connecticut, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Preserve and, on request, make available to the Board or its agents for copying, all records and documents necessary to analyze and determine the amount owed to the union funds.

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to pay our employees the contractual wage rate as set forth in our agreement with Sprinkler Fitters Local Union 676.

WE WILL NOT fail and refuse to make the contractually required payments to the union funds without first engaging in full good-faith negotiations with the Union to the point of impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL reimburse our employees and the Union's funds for the contributions we unlawfully failed and refused to make for the period December 1990 through November 1991.

K & L FIRE PROTECTION SYSTEMS, INC.